

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE OLIVER BEAN,

Defendant-Appellant.

UNPUBLISHED

June 12, 2003

No. 237493

Lake Circuit Court

LC No. 01-003739-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. We affirm.

On August 29, 2001, defendant was convicted of killing a woman with whom he had been having an affair and who had been missing since 1979. Defendant's ex-wife, who was married to defendant in 1979, testified that defendant told her that he shot the victim in the head. She also testified that defendant took her to the location of the body, that she saw the body laying in a shallow depression next to an uprooted tree, and that defendant covered the body with a tree stump that he cut down. Defendant objected to his ex-wife's testimony at his preliminary examination and moved to quash the testimony at trial, asserting the marital communications privilege pursuant to MCL 600.2162. His objection was overruled and motion denied on the grounds that (1) MCL 600.2162 was amended by 2000 PA 182 so that it is the witness' decision whether to testify, not the defendant's decision, and (2) the amendment is retroactive. Defendant appeals.

Defendant argues that he was entitled to assert the marital communications privilege regarding any discussions that he allegedly had with his wife about the murder. In particular, defendant claims that the amendment should not have been applied retroactively because it does not contain retrospective language and such application violated federal and state ex post facto clauses, US Const, art 1, § 10, cl 1; Const 1963, art 1, § 10. However, this Court in *People v Dolph-Hostetter*, ___ Mich App ___, ___ NW2d ___ (Docket No. 242356, issued 5/22/03), rejected both of these arguments.

In *Dolph-Hostetter*, this Court considered whether the amendment to the marital communications privilege, MCL 600.2162(7), violated the federal and state prohibition against ex post facto laws and held, in pertinent part:

Carmell [*v Texas*, 529 US 513; 120 S Ct 1620; 146 L Ed 2d 577 (2000)]; and the longstanding precepts of the cases cited therein indicate, therefore, that the application of the amendment at issue in this case to marital communications occurring before October 1, 2000, does not violate the ex post facto clause of the United States Constitution. Moreover, because the ex post facto clause of the Michigan Constitution is “not interpreted more expansively than its federal counterpart,” the retroactive application of the amendment does not violate the ex post facto clause of the Michigan Constitution. The amended statute only renders witnesses competent to testify, if they choose, or permits the admission of evidence that previously was inadmissible. It does not make criminal any prior action not criminal when done; it does not increase the degree, severity or nature of any crime committed before its passage; it does not increase punishment for anything done before its adoption; and it does not lessen the amount or quantum of evidence that is necessary to obtain a conviction when the crime was committed. It does not fall within Justice Chase’s fourth category of an ex post facto law that “alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence [sic], in order to convict the offender,” because it does not modify the evidence necessary to obtain a conviction. [*Id.*, slip op at 7 (internal citations and footnote omitted)].

The *Dolph-Hostetter* Court also addressed the “defendant’s argument that the amended marital communications privilege cannot operate retrospectively because the Legislature did not expressly indicate that it be given retrospective effect.” Referencing, generally, *Washington v Clevenger*, 69 Wash 2d 136, 143; 417 P2d 626 (1966), this Court held, “[t]he marital communications privilege is invoked at the time of the pertinent court proceedings and thus is not ‘vested’ at an earlier date.” *Dolph-Hostetter*, slip op at 8, n 7. Noting that the amendment became effective on October 1, 2000, the Court held that “[a]t court proceedings on or after that date, the amended statute controlled the admissibility of marital communications.” *Id.*, slip op at 8.

In sum, this Court has recently held that applying the amended marital communications privilege to communications made prior to the amendment does not violate federal and state ex post facto clauses. *Id.*, slip op at 7. Further, such amendment controls the admissibility of marital communications in court proceedings occurring on or after October 1, 2000. *Id.*, slip op at 8. We are bound by, and agree with, the *Dolph-Hostetter* opinion. See MCR 7.215(I)(1).

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra